IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 77-42

~~FLAGG BROTHERS, INC., INDIVIDUALLY AND AS REPRESENTATIVE OF A CLASS OF ALL OTHERS SIMILARLY SITUATED, HENRY FLAGG, INDIVIDUALLY AND AS PRESIDENT OF FLAGG BROTHERS, INC.,~~ THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., ~~WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, AND LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,~~

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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FLAGG BROTHERS, INC., INDIVIDUALLY AND AS REPRESENTATIVE OF A CLASS OF ALL OTHERS SIMILARLY SITUATED, HENRY FLAGG, INDIVIDUALLY AND AS PRESIDENT OF FLAGG BROTHERS, INC., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, AND LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit. That judgment reversed an order of the District Court in

favor of petitioners dismissing, for lack of "state action", respondents' complaint challenging Sections 7-209 and 7-210 of the New York Uniform Commercial Code as violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The judgment remanded the cause to the District Court for class-action determination and to determine the constitutionality of Section 7-210(2) authorizing enforcement by extrajudicial sale of a warehouseman's lien.

OPINIONS BELOW.

The opinion of the Court of Appeals has not yet been reported and is set forth in the Appendix attached to the Petition of Flagg Brothers, Inc. and Henry Flagg. The opinion of the District Court for the Southern District of New York is reported at 404 F. Supp. 1059 (S. D. N. Y. 1975) and is set forth in the Appendix attached to the Petition of Flagg Brothers, Inc. and Henry Flagg.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was made and entered on April 7, 1977. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

A petition for a Writ of Certiorari is being filed by Flagg Brothers, Inc. and Henry Flagg. It is requested that the instant petition be consolidated for consideration with that of Flagg Brothers, Inc., and Henry Flagg.

QUESTIONS PRESENTED.

1. Is "state action" present in the enforcement of a warehouseman's lien for payment of storage charges as provided under New York Uniform Commercial Code Section 7-210?

2. Does the lien enforcement procedure satisfy due process when applied by a commercial warehouse against the goods of a merchant stored in the ordinary course of his business?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The relevant Constitutional provisions and statutes are attached as an Appendix to the petition of Flagg Brothers, Inc. and Henry Flagg. These are: Amendment XIV, Section 1, to the United States Constitution (in part), Section 1 of the 1871 Civil Rights Act, 42 U. S. C. § 1983, and its Federal jurisdictional counterpart, 28 U. S. C. § 1343(3). The full text of Section 7-210 of the New York Uniform Commercial Code is set forth at pages A1-A3 of the Appendix appended hereto.

STATEMENT OF THE CASE.

This case involves the constitutionality of a warehouseman's right to enforce his lien for default in payment of his charges in conformity with § 7-210 of the New York Uniform Commercial Code. This Code provision is substantially the same in 49 states and in the District of Columbia.

The household goods of the respective respondents were stored with petitioner warehouseman Flagg Brothers Inc. in separate transactions. In the course of the storage service, respondents each failed to pay their storage charges and the warehouseman threatened to sell the contents at public auction as permitted by N. Y. U. C. C. § 7-210(2). No sale took place in either case.

On September 21, 1973 respondent Brooks commenced this action as a class action in the United States District Court for New York's Southern District. Federal jurisdiction was invoked under the Civil Rights Act of 1871, 42 U. S. C. § 1983, and its jurisdictional counterpart, 28 U. S. C. § 1343(3). Respondent Jones intervened in the action, by permission of the District Court. Both respondents sought compensatory damages, permanent injunctive relief and a declaration of unconstitutionality under 28 U. S. C. §§ 2201 and 2202. The Attorney General of the State of New York and four associations of commercial warehousemen, including American Warehouseman's Association and The International Association of Refrigerated Warehouses, Inc. (hereinafter termed AWA and IARW), were allowed to intervene by the District Court as parties defendant. The propriety of the class action was never certified under Fed. R. Civ. P. 23(c), although petitioners Flagg Brothers, Inc., and Henry Flagg originally stipulated thereto. The five intervening defendants did not so stipulate at any time.

By decision and order entered July 7, 1975, the District Court denied respondents motion for summary judgment and granted petitioners' cross-motion to dismiss the complaint for lack of Federal jurisdiction and for failure to state a claim upon which relief could be granted. The District Court found that the requisite "state action" necessary to sustain a claim under 42 U. S. C. § 1983 and 28 U. S. C. § 1343(3) is absent in the case of the sale of warehoused goods pursuant to the Uniform Commercial Code. The respondents appealed.

By a 2-1 vote, the Court of Appeals for the Second Circuit reversed the District Court's dismissal. The majority found that the sale provisions were statutory in nature and were in the nature of a public function sufficient to conclude that "state action" was involved. The dissent agreed with the District Court that the enforcement of a warehouseman's lien was never a public function and that the state is not involved in a significant degree in the case of a warehouseman's lien sale.

The Court of Appeals remanded the action to the District Court for class-action determination and for further proceedings on the issue of whether the Uniform Commercial Code's statutory scheme comports with due process.

REASONS FOR GRANTING THE WRIT.

I.

THE INSTANT DECISION OF THE COURT OF APPEALS CONFLICTS WITH THAT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The United States Court of Appeals for the Ninth Circuit has held, in *Melara* v. *Kennedy*, 541 F. 2d 802, *reh. and reh. en banc denied* (Oct. 8, 1976), that the extrajudicial sale of stored household goods to enforce a warehouseman's lien under California Commercial Code § 7210, subd. (2), identical to N. Y. U. C. C. § 7-210(2), does not constitute "state action" within the meaning of the Fourteenth Amendment and of Section 1 of the Federal Civil Rights Act of 1871, 42 U. S. C. § 1983. No appeal has been taken from that decision.

There is, thus, a direct conflict between the Second and Ninth Circuits on whether "state action" is present in a warehouseman's lien sale of stored goods.

The Second Circuit recognized the conflict between the two circuits, stating in its opinion below:

> "We recognize that our holding that the enforcement of the warehouseman's lien pursuant to § 7-210 constitutes action under color of state law is directly contrary to that of the Ninth Circuit in *Melara* v. *Kennedy, supra*. We have given that case due consideration but we disagree with its conclusion and are unpersuaded by its analysis."

That the resolution of the conflict in the holdings of the Ninth and Second Circuits is appropriate is further evidenced by the fact that the same issues are being litigated before the Eighth Circuit in *Cox Bakeries of North Dakota, Inc.* v. *Timm Moving and Storage, Inc.*, No. 76-1722 (8th Circuit, argued February 16, 1977). It is time to resolve the issues in conflict.

This resolution is especially important to petitioners AWA and IARW whose members operate commercial warehouses throughout the United States. Warehouses in one circuit may enforce the lien provisions of the statute while others in another circuit may not. It is appropriate to resolve the conflict and establish a uniform rule.

II.

THE CONSTITUTIONALITY OF THE WAREHOUSEMAN'S LIEN PROVISIONS HAS IMPORTANT CONSEQUENCES AND SHOULD BE RESOLVED.

In a series of decisions the Court has faced the question of due process requirements applicable to various creditor self-help type statutes as applied to consumer transactions. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969); *Fuentes* v. *Shevin*, 407 U. S. 67, *reh. denied*, 409 U. S. 902 (1972); *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974).

As explained in the opinion of the Court of Appeals below there have been a series of cases in the circuit courts involving due process challenges to other lien statutes, such as the innkeepers lien and the garageman's lien.

The warehouseman's lien statute is unlike the statutes involved in these prior Supreme Court and circuit court decisions because, for the first time, the challenged statute governs the relationship between businessmen dealing at arms length, *i.e.* between commercial warehousemen and merchants storing goods in the course of their business, as well as the relationship between individual consumers storing personal household goods and the household goods warehouseman.

Merchandise or commercial warehousemen, represented here by petitioners AWA and IARW, are those who store for merchants who are manufacturing and distributing goods in the national market. Merchandise warehouses perform a vital comcercial function in facilitating the movement of goods in the stream of commerce. Goods from all over the country, as well

as imported goods, are consigned to a local warehouse. The warehouse receives the goods, performs the various break bulk and other commercial services with respect to the goods, and distributes them in customized orders to the various customers of the bailor. Its function is to facilitate the flow of goods from producer to user. Distribution costs are reduced and operating efficiencies are attained.

In providing these vital commercial services the local warehouseman relies upon the existence of the warehouseman's lien. It permits him to assume the risk of receiving goods; storing the goods; performing the necessary break-bulk, packaging and related functions; and shipping the goods. Often he will pay the incoming and outgoing freight charges to facilitate the movement of the goods.

All of these services and expenditures are done in reliance upon the lien. The lien applies to all goods of the bailor in possession of the warehouseman, allowing the release of goods but retaining the security of the lien upon other goods of this bailor in storage.

The existence of the lien allows the free flow of goods through the warehouse without the necessity of prepayment procedures or similar strictures which would preclude the movement of goods until charges have been satisfied. The lien allows the local, generally small warehouseman to deal in the goods of companies located throughout the country and the world without extensive prearrangement for security, credit, prepayment and similar protections. The lien facilitates the movement of goods through the stream of commerce.

The Circuit Court recognized, in the final paragraph of its opinion, the position of the commercial warehouse. It recognized that these petitioners ". . . have raised a serious argument that a summary sale provision in this context (*i.e.* sale by a commercial warehouseman of a merchants goods stored in the ordinary course of business) may be constitutionally unobjectionable." The Court proceeded to draw a distinction between Section

7-210(1) allowing a private sale and Section 7-210(2) requiring a public sale.

However, Section 7-210(8) of the Uniform Commercial Code allows a warehouseman who has a lien upon goods stored by a merchant in the course of his business to enforce it in accordance with either Section 7-210(1), at private sale, or Section 7-210(2), at public sale.

Thus, the decision of the Circuit Court that Section 7-210(2) involves state action and that the constitutionality of that provision can be separately decided from Section 7-210(1) does not resolve the problem for the commercial warehouseman. This approach ignores the fact that the merchandise or commercial warehouseman relies upon both provisions of the statute. Public sale of a merchants goods by a commercial warehouse is equally as important, if not actually more important than the right to conduct a private sale.

Consequently, it is imperative that this Court, assuming it should find that "state action" exists, address the issue of whether the enforcement of the lien against the goods of a merchant stored in the course of his business is constitutional, recognizing the nature of the parties and the type of goods involved.

CONCLUSION.

The Second Circuit decision is in direct conflict with the Ninth Circuit decision in *Melara* v. *Kennedy*, on the same matter. It ought to be reviewed to resolve this conflict. The Uniform Commercial Code has nationwide applicability and commercial uniformity requires a removal of the conflict.

The Supreme Court should also consider the question of the constitutionality of the warehouseman's lien enforcement provisions in so far as they relate to merchandise warehousemen.

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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APPENDIX A.

§ 7-210. Enforcement of Warehouseman's Lien.

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons

against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

IN THE

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THE AMERICAN WAREHOUSEMEN'S ASSOCIATION,
THE INTERNATIONAL ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC.

Petitioners,

—v.—

SHIRLEY HERRIOTT BROOKS, GLORIA JONES,
Individually and on behalf of all others
similarly situated,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE URBAN LAW INSTITUTE
AMICUS CURIAE

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-42

The American Warehousemen's Association, The International Association of Refrigerated Warehouses, Inc.,

Petitioners,

vs.

Shirley Herriott Brooks, et al.,

Respondents.

BRIEF FOR THE URBAN LAW INSTITUTE AS AMICUS CURIAE

MANNER OF FILING

This brief amicus curiae is filed by the Urban Law Institute with the written consent of the parties, as provided by Rule 42 of the Rules of this Court.

INTEREST OF THE AMICUS

The Urban Law Institute was established in 1968 as a legal research and development project funded by the National Legal Services Corporation. The primary purpose of the Institute is to assist in providing more and improved legal services for the poor. The Institute believes that every person, rich or poor, is entitled to equal justice under law. The Institute is concerned with a wide range of legal problems which confront the unrepresented poor of this nation. In its capacity as legal counsel for the poor, the Institute utilizes the legal system in an attempt to solve a variety of problems through effective advocacy in a manner once reserved only for the economically secure in the United States. The disposition of the present case will have significant impact on the clients served by the Institute.

QUESTION PRESENTED

When aided by the involvement of a state law enforcement official, does the enforcement of a warehouseman's lien, pursuant to extra-judicial provisions of state law delegating state authority to private parties, constitute state action within the fourteenth amendment and action under color of state law within 42 U.S.C. § 1983?

STATEMENT OF THE CASE

On June 13, 1973, the original plaintiff in this case, Shirley Herriott Brooks, was evicted from her apartment. Pursuant to an order of the City of Mount Vernon, New York, the city marshal removed Ms. Brooks' belongings and placed them on the street. Ms. Brooks wanted to call someone to store her possessions, but the marshal refused, referring her instead to the defendant Henry Flagg who accompanied the marshal. Mr. Flagg stated that Flagg Brothers would move and store the furniture for $65 a month. Ms. Brooks, although disturbed by what she deemed a high price, felt she had no other alternative. She agreed. However, once the goods were on the moving truck, the price began to spiral. Under protest, she paid what was then demanded: $178 -- $75 per month for storage, $75 for barreling and platforming, and $28 for fumigation.

Two days later, Ms. Brooks called Flagg Brothers to determine how long it would store her possessions for the $178. She was told that the $178 was only a deposit and that she owed an additional $156. Further, she was told that as of July 1, she would owe another $75 for the month of July. Ms. Brooks objected, but Flagg Brothers

maintained that its charges were for the calendar month, not to be confused with a 30-day month. In other words, for 17 days of storage in June, Ms. Brooks was being charged the full monthly storage fee of $75.

The dispute over storage charges continued. On August 25, 1973, Flagg Brothers indicated it would sell Ms. Brooks' possessions, unless she paid the outstanding balance of $306. Ms. Brooks then filed suit in the United States District Court for the Southern District of New York seeking injunctive and declaratory relief and damages on the grounds that detention and threatened sale of her goods under the New York Uniform Commercial Code §§ 7-209 and 7-210 violated the due process clause of the fourteenth amendment. The suit was based on 42 U.S.C. § 1983. The suit named the Mount Vernon marshal,[1] Henry Flagg and Flagg Brothers, Inc. The complaint included plaintiff and defendant class allegations.

After the complaint had been filed, Ms. Brooks was allowed to obtain her possessions from Flagg Brothers without paying the disputed charges by agreement of counsel. In February, 1974, counsel stipulated the designation

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[1] The action as applied against the marshal was later dismissed by agreement of the parties.

of the classes as proposed, but the district court failed to approve the stipulation.

On June 25, 1974, Gloria Jones was permitted to intervene as a party plaintiff. Her factual allegations were similar to Ms. Brooks'. Ms. Jones, also a resident of Mount Vernon, was evicted by the city marshal, who was also accompanied by a representative of Flagg Brothers. Flagg Brothers moved and stored Ms. Jones' belongings, but she maintains she neither gave any authorization to the mover nor was advised of any charges. At the time of intervention, Ms. Jones' goods were in the possession of Flagg Brothers who informed her counsel that it had no present intention to sell her belongings.[2]

In the same order which granted Ms. Jones intervention, the district court also permitted intervention by the Attorney General of the State of New York, the American Warehouseman's Association, the International Association of Refrigerated Warehouses, Inc., and the Warehouseman's Association of the Port of New York as intervenors-defendants.

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[2] After the district court dismissal, Ms. Jones paid, under protest, $1600 to regain her possessions. She discovered that some of the goods returned were damaged.

In late 1976, while the case was on appeal in the Second Circuit, Ms. Jones died. Her interest survives for her estate.

OPINIONS BELOW

404 F. Supp. 1059 (S.D.N.Y. 1975):

On August 26, 1974, plaintiffs moved for class certification for both plaintiffs and defendants. They also moved for summary judgment, urging the court to declare N.Y.U.C.C. §§ 7-209 and 7-210 unconstitutional. On September 19, 1974, the Flagg defendants moved to dismiss the complaint for failure to state a claim for which relief can be granted.

The district court denied the plaintiffs' motion for summary judgment and granted the defendants' motion to dismiss. The court found the actions of the mover in imposing and enforcing his lien under §§ 7-209 and 7-210 were not "under color of" state law within the meaning of 42 U.S.C. § 1983 and state action under the fourteenth amendment.

553 F.2d 764 (2d Cir. 1977):

Plaintiffs Brooks and Jones appealed the dismissal to the court of appeals. The court reversed and remanded. It found that the warehouseman's enforcement of his lien pursuant to the §§ 7-209 and 7-210 was "under color of" state law within the meaning of 42 U.S.C. § 1983. The court reasoned that § 7-210 was a delegation of New York's sovereign authority over binding conflict resolution, which coupled with the corresponding expansion of creditor common law remedies, was state action under the fourteenth amendment.

The court instructed the district court to first determine the class action certification questions, and then determine if the challenged statutes satisfied constitutional due process requirements. The court stayed enforcement of its order pending outcome of the case in this Court.

ARGUMENT

I. WHEN AIDED BY THE INVOLVEMENT OF A STATE LAW ENFORCEMENT OFFICIAL, THE ENFORCEMENT OF A WAREHOUSEMAN'S LIEN PURSUANT TO EXTRAJUDICIAL PROVISIONS OF STATE LAW CONSTITUTES STATE ACTION WITHIN THE FOURTEENTH AMENDMENT AND ACTION UNDER COLOR OF STATE LAW WITHIN 42 U.S.C. § 1983.

Respondents were evicted from their residences in 1973. In both instances, respondents were evicted by the Mount Vernon city marshal while conveniently accompanied by representatives of the same storage company, Flagg Brothers, Inc. In Ms. Brooks' case, the marshal refused to allow her to call someone else to store her belongings. In Ms. Jones' case, Flagg Brothers stored her belongings without any request from her to do so. From all appearances, the city marshal and Flagg Brothers had a working relationship, one which certainly increased Flagg Brothers' income. Based on these facts, and

these alone, there can be no doubt as to the significant involvement of the state in the challenged conduct. The city marshal evicted the plaintiffs, and his presence lent authority and stature to the storage company. Given a choice between having one's belongings left in the street and having them stored by the mover who accompanies the marshal, respondent Brooks had little choice. Once Flagg Brothers secured the possessions, under unconscionable conditions, then the state of New York (UCC § 7-209, 210), protected the mover by allowing it to unilaterally determine the storage fees, however exorbitant, and press the plaintiffs for payment. Flagg Brothers was secure in the knowledge that if the plaintiffs failed to pay, then the state would protect the mover again in its sale of the stored goods.

State action under the fourteenth amendment or action "under color of" law under 42 U.S.C. § 1983[3] is required

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[3] As the Court noted in United States v. Price, 383 U.S. 787, 794, n.7.

> ". . .In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the fourteenth amendment. See, e.g., Smith v. Allwright, 321 U.S. 649; Terry v. Adams, 345 U.S. 461; Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (C.A. 4th Cir.)

for due process to attach. Here the specific concern is whether state action is present where private parties act in concert with government officials. There is a strong unbroken string of cases which indicates there is state action under the present circumstances.

Screws v. United States, 325 U.S. 91 (1945) involved police officers who, subsequent to arresting a black man, beat him to death. Petitioners argued unsuccessfully, and rather cynically that, while their actions might be prosecutable under state law, they were not federal civil rights offenses. The Supreme Court emphatically rejected that claim stating:

> It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the orbit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of

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(footnote cont'd)

> cert. denied, 376 U.S. 938; Smith v. Holiday Inns, 336 F.2d 630 (C.A. 6th Cir.); Hampton v. City of Jacksonville, 304 F.2d 320 (C.A. 5th Cir.); cert. denied, 371 U.S. 911; Bowman v. Birmingham Transit Co., 280 F.2d 531 (C.A. 5th Cir.); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (C.A. 4th Cir.); cert. denied, 326 U.S. 721."

their authority or overstep it.

Id. at 111.

In Williams v. United States, 341 U.S. 97 (1951) the Court found state action in a case where a private detective licensed as a special police officer, brutalized "confessions" out of employees suspected of stealing from an employer's lumber yard. The Court held that the brutalities were "conducted under the aegis of the state, as evidenced by the fact that a regular police officer was detailed to attend it." Id. 99-100. The Court upheld the conviction of the private detective.

In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) the Court found state action in a case where a black person was refused service in a private restaurant located in a building owned by a public agency. The test of a private party's conduct qualifying as state action, as defined in Burton, is joint participation with the state in the challenged conduct.

United States v. Price, 383 U.S. 787 (1966) strongly reaffirmed the Burton test for state action. The case involved the notorious murders of three civil rights workers in Mississippi by police officers and private vigilantes. The Court found the actions of the private persons were state action. The Court unequivocally held the private parties liable who acted in concert with state officials in the challenged activity.

Section 242 applies only where

> a person indicted has acted "under color" of law. Private persons jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.

Id. at 794.

Finally, in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), the Court reaffirmed the joint participation test. The case concerned a white teacher in the company of black students who was refused service at a lunch counter, and then subsequently arrested for vagrancy. The case is especially important because of its similarities to the instant case. The teacher sued under § 1983, but the complaint was dismissed by the district court for failure to state a claim. In language significant here the Court stated:

> Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her fourteenth amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg

policeman somehow reached an understanding to deny Miss Adickes service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes.

The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's fourteenth amendment equal protection rights, whether or not the actions of the police were officially authorized, or unlawful; Monroe v. Pape, 365 U.S. 1671 (1961); see United States v. Classic, 313 U.S. 299, 326 (1941); Screws v. United States, 325 U.S. 91, 107-111 (1945); Williams v. United States, 341 U.S. 97, 99-100 (1951). Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color of' law for purposes of the statute. To 'act under color of' law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." United States v. Price, 383 U.S. 787, 794 (1966).

Id. at 152.

In the present case, the district court dismissed respondents' complaint on the same basis as in Adickes. The facts are conceptually analogous, too. In Adickes, a private party was alleged to have participated jointly with a policeman to deprive citizens of federal civil rights. Here, a private party is alleged to have participated jointly with the city marshal to deprive respondents' of their federal civil rights. In both instances, the private party was sued, not the state official.

Similarly, respondents will have demonstrated state action under the fourteenth amendment and be entitled to relief under § 1983 if they can prove joint participation of Flagg Brothers and the city marshal to deprive them of their right to freely contract by effectively forcing storage of their goods in the facilities of Flagg Brothers which was protected in the unilateral determination of fees by the state (New York Uniform Commercial Code §§ 7-209 and 7-210). Price supports this result, having first expressly laid out the joint participation test. In that case, as here, there was a confluence of private parties and the police depriving victims of their civil rights. The Court found state action. Burton, Williams, and Screws, all were essential to the development of the joint participation test articulated in Price and Adickes. Those cases lend their support to this case in a similar manner.

It has been suggested that in civil rights cases involving race, there is a lower state action standard than in non-racial cases. While the civil rights cases cited here involve race, there is no evidence that the enforcement of the fourteenth amendment was ever designed to make non-racial prohibited activities less actionable.[4]

It is therefore clear that the relationship between petitioners and the city marshal was permeated with elements of joint participation which taken together, amount to state action. Respondents were faced with a law enforcement official who ominously appeared, and ejected their goods onto the street. Yet the marshal's face of stern authority seemed tempered with a sense of compassion. Thoughtfully, he had brought along Flagg Brothers to move and store the goods. Here the state and the private parties were acting in concert to compel the respondents to store with Flagg Brothers as opposed to losing everything on the street. Once the warehouseman took possession of the goods, the right to enforce his lien by extra-judicial sale was conferred by statute. On the one hand, it could coerce respondents for payment of exorbitant storage fees, or on the other hand, it could sell the goods in satisfaction of the inflated charges.

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[4] See Thompson, Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession, 1977 Wisconsin L. Rev. 1, 19.

As the court of appeals noted below:

> New York Uniform Commercial Code § 7-210 provides the warehouseman with a truly extraordinary remedy. After giving the bailor specified notice, the warehouseman is entitled to sell the stored goods in satisfaction of whatever he determines the storage charges to be. The warehouseman, unquestionably an interested party, is thus authorized by law to resolve any disputes over storage charges finally and unilaterally.

553 F.2d at 771.

The joint participation of the city marshal and Flagg Brothers, effectively compelling respondents to store their possessions with Flagg Brothers was state action under the fourteenth amendment, and action under "color of law" within the meaning of 42 U.S.C. § 1983. The warehouseman's extra-judicial lien sale manifests significant power possessed by virtue of state law. It is made possible only because the warehouseman is clothed with authority uniquely created by state statute and subjects the resultant conduct to constitutional scrutiny.

II. STATE ACTION IS PRESENT WHERE PRIVATE PARTIES ACT PURSUANT TO A STATE STATUTE WHICH DELEGATES SIGNIFICANT POWER TO PERFORM GOVERNMENTAL FUNCTIONS.

The Court has found state action where private parties engage in functions traditionally performed by governmental authorities. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1940); Nixon v. Condon, 286 U.S. 73 (1932); and Nixon v. Herndon, 273 U.S. 636 (1927). In each case cited above, a statute or political party resolution authorized a private political party to determine their membership qualifications -- which enabled party officers to prohibit black persons from voting in party primary elections. Despite the fact that the state held separate public primary elections, denying black persons the vote in party primaries was significant because it denied them "effective voice in the governmental affairs of their country." 345 U.S. at 466. The Court reasoned that governmental functions, even when privately performed, are inherently state action.

The court of appeals below correctly interpreted N.Y.U.C.C. § 7-210 (Enforcement of a Warehouseman's Lien), finding state action and basing that finding in part on the following:

> [T]he warehouseman is entitled

> to sell the stored goods in satisfaction of whatever he determines the storage charges to be. The warehouseman ...is thus authorized by law to resolve any disputes over storage charges finally and unilaterally. (emphasis added).

Brooks v. Flagg Brothers, Inc., 553 F.2d 764, 771 (2d Cir. 1977).

State action is present when the warehouseman acts pursuant to N.Y.U.C.C. § 7-210. At common law, there was no right for the warehouseman to sell goods held by him without judicial approval. It is only the legislatively created and intensely regulated power of sale which is the source of the warehouseman's right today. Furthermore, the warehouseman, in selling goods owed by the so-called debtor, is performing a function which was traditionally performed only by state officers pursuant to a judicial order. Thus the state, as the creator and regulator of a private right of sale, has delegated its traditional state function of dispute resolution to a private party and becomes significantly involved in that party's conduct.

A. Neither English Nor New York Common Law Permitted Warehousemen to Enforce Liens on Stored Goods By Extra-Judicial Sales.

The warehouseman's ability to enforce his lien by private right of sale is a relatively recent development. English common law never recognized or permitted such right. While the law granted the warehouseman a lien on particular goods stored in his possession, he was only allowed to hold those goods until his storage charges were paid. One commentator, in a treatise on common law liens, states:

> A warehouseman's lien is a specific lien for the charges due upon the particular goods that have been stored. A warehouseman has no lien upon the goods in his possession for any indebtedness to him from the owner, disconnected with the charges for storage.

> 1 Jones, A Treatise on the Law of Liens, § 976 at 666 (1st Ed. 1888).
>
> A warehouseman's lien, like other common law liens, confers no right to sell the property to which the lien attaches, but only the right to hold it till his charges are paid. Id. § 976 at 672. (emphasis added).

In order for the warehouseman to sell the stored property, the common law compelled him to institute legal proceedings on the debt or to foreclose the lien and recover his charges from the proceeds of a judicially supervised sale. Id. § 335, at 218; and 2 Jenks, A Digest of English Civil Law, §§ 1574-86 at 854-862 (3rd Ed. 1938). In fact, a sale without resort to legal process was illegal, and constituted conversion. Jones, supra. § 976 n.1 at 672.

In 1879, the New York legislature, in derogation of the English common law enacted Ch. 336 N.Y. Law 417, Sec. 1, enabling a warehouseman for the first time, to sell stored goods without judicial process.[5] As a prerequisite, the statute required that the stored

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[5] Ch. 336 (1879) N.Y. Laws 417 Section 1.

Section 1. Every warehouse company, or person or persons, engaged in the warehouse business who shall have had in their posse-

goods could not be sold "until six months after termination of the time for which such goods were received." Id. Sec. 1. The statute also required that there "be due

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(footnote cont'd)

ssion any goods, wares, or merchandise by virtue of an agreement or warehouse receipt for the storage of the same on which or any part thereof there may be due two years storage, may proceed to sell them at public auction, and out of the proceeds may retain the charges for storage of said goods, wares, and merchandise, and any advances that may have been made thereon by him and the expense of advertising and sale thereof; but no such sale shall be made until after the giving of a printed or written notice of such sale, containing a description of the articles to be sold, together with the name of the person or persons storing the same, nor until six months after termination of the time for which such goods were received. (Emphasis added)

two years storage charges." Id. New York's enactment of the 1879 statute as well as its enactment of the current statute, N.Y.U.C.C. § 7-210 provided warehousemen with remedies unavailable at common law.[6] The challenged statute permits the warehouseman to sell the stored property within twenty-six days of the receipt of the goods. Id. New York's involvement is the delegation of power to the warehouseman to enforce the lien by private sale of property in which the warehouseman possesses no titular interest.

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6 N.Y.U.C.C. § 7-210 (2) (c) requires the warehouse man to notify the interested parties of the charges due and of the time in which payment must be made; a period not less than ten days. N.Y.U.C.C. § 7-210 (2) (f) authorizes sale of the goods after two weeks of advertising the sale following the closing of the N.Y.U.C.C. § 7-210 (2) (c) redemption period.

B. N.Y.U.C.C. § 7-210 Delegates Judicial Functions to the Warehouseman.

It is a governmental function to provide a system for elections.[7] It is equally a governmental function to provide and operate a judicial system. "[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Marbury v. Madison, 1 Cranch 137, 161, 2 L.Ed. 60 (1803).

It is true that "[a] state may, of course, distribute the functions of its judicial machinery as it sees fit." Byrd v. Blue Ridge Rural Electric Co-op., Inc., 356 U.S. 525, 536 rehearing denied, 357 U.S. 933 (1958), but it is also true that "[t]he regulation of the forms of administering justice by the courts is an incident of sovereignty [and the] surrender of this power is never to be presumed." Railroad Company

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7 Terry v. Adams, 345 U.S. 461 (1953). Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1940); Nixon v. Condon, 286 U.S. 73 (1932); and Nixon v. Herndon, 273 U.S. 536 (1927).

v. Hecht, 95 U.S. 168, 170 (1877). "Dispute settlement" is a function of the "courts or other quasi-judicial official bodies," Boddie v. Connecticut, 401 U.S. 371, 375 (1971). N.Y.U.C.C. § 7-210 authorizes the warehouseman by law "to resolve any disputes over storage charges finally and unilaterally." 553 F.2d at 771. Although New York has a "monopoly over techniques of final dispute settlement," 401 U.S. at 375, the state's passage of N.Y.U.C.C. § 7-210 has delegated some of those powers and functions to the warehouseman. "If the State had not conferred [this power] there could be hardly color of right to give a basis for its exercise." Nixon v. Condon, 286 U.S. at 85.

The historical development of whe warehouseman's lien demonstrates that the State has, in the interest of economy, abdicated its traditional lien enforcement role and surrendered it to private persons. As Mr. Justice Douglas stated in Evans v. Newton, 382 U.S. 296, 299 (1966):

> . . .where private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities

of the State and subject to its constitutional limitations.

Since New York has chosen to promote the free flow of commerce by delegating to the warehouseman state powers to adjudicate disputes, New York has created a symbiotic relationship between itself and the warehouseman. As a result, the warehouseman should be treated as the state itself. The unmistakeable impact on the warehouseman's conduct caused by N.Y.U.C.C. § 7-210 requires a finding of state action.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals which found state action should be affirmed.

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